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No. 00-24

IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE HONORABLE ROBERT J. DOLE, TOM HARKIN, STENY H. HOYER, JAMES M. JEFFORDS AND EDWARD M. KENNEDY IN SUPPORT OF RESPONDENT

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The Honorable Robert J. Dole, Tom Harkin, Steny H. Hoyer, James M. Jeffords and Edward M. Kennedy respectfully submit this brief *amici curiae*. Letters of consent from both parties have been filed with the Clerk of this Court[1]. The brief urges affirmation of the decision below and thus supports the position of the respondent Casey Martin before this Court.

[1] Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel to *amici* contributed money or services to the preparation and submission of this brief.

INTEREST OF THE *AMICI CURIAE*

Each of the *amici* played leadership roles in the U. S. Congress in the development and passage of the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-12213. The interest of the *amici* is to provide the Court with information regarding the concerns addressed by Congress through passage of the ADA.

Amici, current and former Members of Congress, spent years examining the problems of discrimination based on disability and carefully crafted statutory language to remedy such discrimination. *Amici* have an interest in preventing the discrimination that this legislation makes unlawful. This is especially true when the precise language of the statute clearly requires modification of the petitioner's rule prohibiting the use of golf carts to allow access by the respondent, a modification that petitioner seeks to avoid.

Amici have first-hand knowledge of the legislative history that exists in the public record and seek to bring to the attention of the Court parts of the public record that were developed contemporaneously with the passage of the ADA that demonstrate Congressional intent in support of the plain meaning of the statute.

Petitioner's characterization of the ADA is without support in the text of the statute and would subvert Congressional intent that the ADA comprehensively prohibit discrimination on the basis of disability. Petitioner would leave public accommodations with largely unfettered discretion to engage in such discrimination. Petitioner's mischaracterization of the ADA obscures two of the statute's key characteristics – the breadth of its scope and the strength of its nondiscrimination standards.

SUMMARY OF ARGUMENT

The express language of the ADA, as well as its policy framework and legislative history, unequivocally support the decision of the Ninth Circuit that Title III applies to golfers competing in petitioner's tour events and that the modification requested by respondent, use of a golf cart, would not fundamentally alter these events.

The ADA established a "comprehensive national mandate" for "clear, strong, consistent, enforceable standards" for the elimination of discrimination on the basis of disability. 42 U.S.C. §§12101(a)(2), (a)(3), (b)(1), and (b)(2). Congress intended this statute to be read expansively, not narrowly, to afford the greatest possible protections to persons with disabilities.

As leading architects of the ADA, *amici* know well that Congress intentionally predicated the law on the foundation established by prior civil rights laws, especially the Civil Rights Act of 1964. In particular, Congress drafted Title III of the ADA to encompass, and expand upon, the provisions of Title II of the Civil Rights Act of 1964 that defined the scope of the law's applicability to public accommodations. Because participants in athletic contests are covered by Title II of the Civil Rights Act of 1964, Congress clearly intended that they be embraced by Title III of the ADA. Furthermore, by its own terms and legislative history, the ADA fully applies to professional athletes competing in sporting events.

Petitioner's efforts to carve out exceptions or limitations to the broad scope of Title III, *e.g.*, for participants in professional sports, are ill conceived. Exceptions to Title III were specifically and carefully crafted by Congress and there is no support in the statute or its

legislative history for the argument that additional exceptions narrowing the intended breadth of Title III may be read into the law

The ADA requires a public accommodation to make "reasonable modifications" to policies and practices to afford an individual with a disability an opportunity to obtain the goods, services, facilities, privileges, or accommodations that it offers. However, a public accommodation need not make the modifications if it "can demonstrate" that it "would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." 42 U.S.C.§ 12182(b)(2)(A)(ii). The reasonable modification requirement is a critical element of the non-discrimination mandate of the ADA. For this reason, the "fundamental alteration" standard is stringent, requiring the public accommodation to demonstrate that the modification would alter the essential nature of the goods or services being offered. The Ninth Circuit correctly found that the petitioner failed to carry this burden with respect to respondent's use of a golf cart in tour events.

Petitioner's contentions that it should be excepted from the reasonable modification obligation because it conducts high-level sports competitions, the uniformity of its rules should be inviolate, and individualized modifications would be burdensome, have no basis in the statutory language or legislative history of the ADA.

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. TITLE III OF THE AMERICANS WITH DISABILITIES ACT PROHIBITS DISCRIMINATION ON THE BASIS OF DISABILITY AGAINST ATHLETES AND OTHER PERFORMERS AT PLACES OF PUBLIC ACCOMMODATION.

A. In Enacting the ADA, Congress Intended to Eliminate Discrimination from Public Accommodations and Other Aspects of American Society.

1. The Broad Overall Congressional Goal.

In enacting the ADA, Congress addressed "a serious and pervasive social problem," 42 U.S.C. §12101(a)(2) – *viz.* discrimination on the basis of disability. Congress acted in a systematic fashion, considering legislation during the 100th and 101st Congresses. During this period, Congress identified some of the devastating results of discrimination based on disability, including relegation of people with disabilities to "an inferior status in our society" in which they are "severely disadvantaged socially, vocationally, economically, and educationally," and "denie[d] the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." *See id.* § 12101(a)(6) and (9). Congressional investigation disclosed a drastic under-utilization of public accommodations by people with disabilities. *See* S. Rep. No. 101-116, at 10-11 (1989); H.R. Rep. No. 101-485, pt. 2, at 34-35 (1990).

As a result of this lengthy investigation, Congress concluded that discrimination existed in a variety of "critical areas" of life including "public accommodations," and that "people with disabilities continually encounter various forms of discrimination." 42 U.S.C. § 12101(a)(3) and (5). This conclusion was specifically supported by voluminous documentation, including seven extensive reports expressly referenced in Congressional committee reports.[2] These

[2] S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990). The seven reports are as follows: TOWARD INDEPENDENCE (1986)

reports included descriptions of some of the precise forms of discrimination Congress sought to remedy. For example, the U.S. Commission on Civil Rights' report entitled, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983), included "[d]enial of access to professional and semipro teams" in an Appendix of "issue areas in which problems of discrimination occur." *Id.* at 165, 168. This report demonstrates that Congress intended the ADA to cover professional sports activities, including the professional atheletes.

To address such a drastic and widespread problem, *amici* and other Members of Congress did not resort to half measures in enacting the ADA. Congress was abundantly clear that the purpose of the ADA is to provide a "comprehensive national mandate for the elimination of discrimination," that would establish "clear, strong, consistent, enforceable standards ...." 42 U.S.C. § 12101(b)(1) and (2). In captioning the ADA as "[a]n Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability" (Pub. L. No. 101-336, 104 Stat. 327(1990)), Congress indicated clearly that it was not seeking to address discrimination based on disability in a partial or piecemeal fashion.

The "broad," "comprehensive," and "omnibus" nature of the ADA was stressed throughout its legislative history.[3] In

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and ON THE THRESHOLD OF INDEPENDENCE (1988) by the National Council on Disability; U.S. Commission on Civil Rights report ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); Louis Harris and Associates, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM, (1986) and THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS (1987); REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (1988); and REPORT OF THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES (1990).

[3] *See, e.g.*, S. Rep. No. 101-116, at 18-19 (1989) ("omnibus civil rights legislation"; "comprehensive civil rights legislation for people with disabilities"); H.R. Rep. No. 101-485, pt. 2, at 48 (1990) ("omnibus civil rights legislation"; "comprehensive civil rights legislation for people with disabilities"); H.R. Rep. No. 101-485, pt. 3, at 26 (1990) ("a comprehensive piece of civil rights legislation"); H.R. Rep. No. 101-485, pt. 4, at 24 (1990) ("broad-based protection against discrimination"); 135 CONG. REC. S 4984 - S 4985 (daily ed. May 9, 1989) (ADA introductory statement of Sen. Harkin) ("a broad and remedial bill of rights for people with disabilities"; "omnibus civil rights statute"; Presidential Commission on HIV recommendation of "comprehensive Federal antidiscrimination legislation"); 136 CONG. REC. H 2438 (daily ed. May 17, 1990) (statement of Rep. Edwards) ("comprehensive antidiscrimination protections"); 136 CONG. REC. H 2444 (daily ed. May 17, 1990) (statement of Rep. Matsui) ("it is a comprehensive package"); 136 CONG. REC. S 9695 (daily ed. July 13, 1990) (statement of Sen. Dole) ("the most comprehensive civil rights legislation our Nation has ever seen").

announcing the Bush Administration's support for the ADA, then-Attorney General Thornburgh testified during Congressional hearings that "[o]ne of its most impressive strengths is its comprehensive character." *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources, Subcomm. on the Handicapped*, 101st Cong. at 192-197 (1989). He also decried "piecemeal" and "patchwork quilt legislative approaches...." *Id.*

2. *The Statutory Language of Title III.*

Congress formulated the nondiscrimination mandates of Title III in extremely broad terms. The general prohibition of discrimination declares: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

This language is expansive in several ways. It guarantees any individual who is discriminated against on the

basis of disability, "full and equal enjoyment" of public accommodations. It applies inclusively to "the goods, services, facilities, privileges, advantages, or accommodations" provided by a public accommodation. As to who is prohibited from discriminating, the language encompasses not just the owner of a place of public accommodation but "any person who owns, leases (or leases to), or operates" such a place. *Amici* and other members of the 101st Congress articulated a broad nondiscrimination requirement intended to achieve the goal of affording access to persons with disabilities to all aspects of society.

The approach of the ADA in Title III tracks that of Title II of the Civil Rights Act of 1964 by regulating "public accommodations" whose operations "affect commerce," and using the same definition of "commerce."[4] Title III of the ADA owes its conceptual origins, much of its terminology and its remedies[5] to Title II of the Civil Rights Act of 1964. Congress, in crafting the ADA, chose to expand upon the types of entities defined as public accommodations.

The Title III definition of public accommodation is formulated as a list of twelve broad categories of establishments, including golf courses.[6] The twelve categories

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[4] 42 U.S.C. § 12181(7) (Title III incorporation of "if the operations of such entities affect commerce," language from the definition of "public accommodation" in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)); 42 U.S.C. § 12181(1) (defining "commerce" in Title III in same manner as in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(c)).

[5] *See* n. 9 *infra*.

[6] 42 U.S.C. § 12181(7) defines as a "public accommodation" a private entity that falls into any of the listed categories of establishments if its operations affect commerce. The categories include (A) places of lodging; (B) establishments serving food or drink; (C) places of exhibition or entertainment, including motion picture houses, theaters, concert halls, and stadiums; (D) places of public gathering, including auditoriums, convention centers, and lecture halls; (E) sales or rental establishments; (F) service establishments; (G) public transportation stations; (H) places of public display or collection; (I) parks, zoos, amusement parks, and other

cover, with a few exceptions, such as the sale or rental of private housing,[7] almost every facet of American life in which a business establishment or other entity serves or comes into contact with members of the general public.

Congressional committee reports explained the expanded scope of the ADA's coverage of public accommodations:

> It is critical to define places of public accommodation to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which are the types of establishments covered by title II of the Civil Rights Act of 1964) because discrimination against people with disabilities is not limited to specific categories of public accommodations. The Attorney General has stated that we must bring Americans with disabilities into the mainstream of society "in other words, full participation in and access to all aspects of society."

H.R. Rep. No. 101-485, pt. 2, at 35 (1990), quoting *Americans with Disabilities Act: Hearings on H.R. 2273 Before the House Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights*, 101st Cong. at 192 (1989) (testimony of Attorney General Thornburgh).

3. *Building Upon the Foundation of Title II of the Civil Rights Act of 1964.*

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places of recreation; (J) schools and other places of education; (K) social service establishments; and (L) gymnasiums, health spas, bowling alleys, golf courses, and other places of exercise or recreation.

[7] Discrimination on the basis of disability in housing is prohibited under the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 28 U.S.C. §§ 2341, 2342; 42 U.S.C. § 3601 *et seq.*

In enacting the ADA, Congress consciously built upon the foundation established by prior civil rights laws, particularly the Civil Rights Act of 1964.[8] By doing so, Congress embraced the jurisprudential framework that had developed around the Civil Rights Act.

Title II precedents afforded guidance as to how broadly a nondiscrimination provision regulating public accommodations should be interpreted. Two principles established in Title II cases are particularly relevant to the present controversy:

> (1) The coverage of a public accommodation should be interpreted broadly consistent with "the overriding purpose" of Title II to eliminate discrimination. *Daniel v. Paul*, 395 U.S. 298, 306-308 (1969).[9]
>
> (2) An entity can qualify as a public accommodation because of a service it provides to direct participants in some sport or activity as well as because it entertains spectators. *Id.* [10]

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[8] *See, e.g.*, 42 U.S.C. § 12188 (adopting remedies and procedures set forth in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a) as remedies and procedures under Title III); 42 U.S.C. § 12187 (exempting from Title III "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000-a(e))"); 42 U.S.C. § 12117(a) (adopting as Title I remedies and procedures those available under certain provisions of Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 12181(7) (incorporating "if the operations of such entities affect commerce" language from definition of public accommodation in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)); 42 U.S.C. § 12181(1) (defining "commerce" in Title III in same manner as in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(c)).

[9] *See also Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 349 (5th Cir. 1968) (Title II not to be read "with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public"; it is "well established" that these provisions are "to be liberally construed and broadly read").

[10] *See also Miller v. Amusement Enterprises, Inc.* 394 F. 2d at 350. (Phrase

Two of the Title II precedents involved alleged discrimination against golfers. *Evans v. Laurel Links*, 261 F.Supp. 474 (E.D. Va. 1966), was a class action seeking to require the operators of a commercial golf course to permit African-Americans to play on their course. The court ruled that the golf course was a place of exhibition or entertainment under Title II. *Id.* at 477. While "[t]he Act prohibits discrimination among spectators who patronize a place of exhibition or entertainment," said the court, "its application is not limited to spectators if the place of exhibition or entertainment provides facilities for the public to participate ...." *Id.* In words that are manifestly applicable to the present case, the court concluded that Title II "provides that all persons are entitled to the full and equal enjoyment of the facilities, privileges, advantages and accommodations of a covered establishment." In short, the statute protects both golf spectators and participants from discrimination. *Id.*

In *Wesley v. City of Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969), the court held that Title II prevented a private golf association from engaging in racial discrimination in a city golf tournament. *Id.* at 700-03. Construing the coverage of Title II liberally, the court enjoined the association from holding the tournament until it ended its discriminatory practices. *Id.*

As described above, the scope of the public accommodation provisions of Title III encompass and then expand the scope of the public accommodation provisions of

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"place of entertainment" in Title II "includes both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons"); *United States v. Slidell Youth Football Association*, 387 F. Supp. 474. 480-82 (E.D. La. 1974) (both intentional exclusion of black football players, and resultant denial to their parents of opportunity of watching their children play football violated Title II); *United States v. Johnson Lake, Inc.*, 312 F. Supp. 1376, 1380 (S.D. Ala., 1970) (racial discrimination at swimming and dancing facilities subject to Title II both because of effects on participants and those who come to watch participants).

Title II of the Civil Rights Act of 1964. Because participants in athletic contests were covered under the Civil Rights Act of 1964, Congress certainly intended such activity to be covered under Title III.

B. Title III Protects Persons Such as Respondent Who Perform or Participate in Events at Places of Public Accommodation.

The plain language of Title III affords protection from discrimination to persons such as respondent who participate in events at a place of public accommodation. Respondent seeks to obtain the full and equal enjoyment of "the goods, services, facilities, privileges, advantages, or accommodations" of a golf course. 42 U.S.C. § 12182(a). The statute says that in such a situation "[n]o individual shall be discriminated against on the basis of disability…." *Id.*

This straightforward reading of the statute is reinforced by the principles established under Title II of the Civil Rights Act of 1964 discussed in section I.A.3 *supra*. Thus, petitioner's tournaments are a public accommodation because they provide services to the competitors and because they entertain spectators.

1. Petitioner's Purported Exceptions to the Statutory Language of Title III.

To avoid the application of the plain language of Title III, petitioner attempts to invent exceptions to Title III's coverage. Petitioner suggests at various places in its brief that Title III does not cover "players," "competitors," "performers," "participants," "independent contractors," or activities "inside the ropes," Pet. Br. at 12-28. However worded, none of these contentions has any basis in the language or legislative history of the ADA. And, in arguing that implied exceptions should be read into Title III's coverage, petitioner completely ignores

the express language, structure, stated purposes, and spirit of the ADA.

Petitioner's contention is predicated on an illogical interpretation of the terms "clients or customers." *Id.* at 19-22. The phrase "clients or customers" appears in an ADA provision clarifying that public accommodations which contract to have goods, services, facilities, privileges, advantages, or accommodations provided are still responsible for ensuring that the ultimate beneficiaries, the "clients or customers," are provided such goods, services, facilities, privileges, advantages, or accommodations without discrimination on the basis of disability. 42 U.S.C. § 12182(b)(1)(A)(iv). The provision uses the phrase "clients or customers" to refer to persons who receive or seek to obtain goods, services, facilities, privileges, advantages, or accommodations at a place of public accommodation. *Id.* Nothing in the statute or its legislative history suggests that this phrase was intended to narrow the class of beneficiaries of public accommodations to be protected from discrimination under the statute.

Petitioner's analysis fails to recognize that a public accommodation may simultaneously serve various types of clients and customers. People who come to browse and buy at a flea market, for example, clearly are "clients or customers" of the facility. At the same time, however, the facility rents spaces to individual vendors. The vendors are "clients or customers" of the flea market because they seek to use and enjoy the services, facilities, privileges, advantages, and accommodations it provides. If the flea market had a rule excluding deaf vendors, the ADA would prohibit it just as clearly as if the flea market barred deaf shoppers.

The PGA Tour, Inc. ("PGA") serves a class of customers and clients comprised of spectators at PGA events. At the same time, it serves another class of clients or customers -- the golfers who compete in its events. As an operator of events in a place of public accommodation, the PGA is

statutorily required not to discriminate on the basis of disability against any class or type of clients or customers it serves.

Petitioner makes several arguments concerning Title III's relationship to "employment" activities. First, petitioner contends that respondent is a "worker" because he seeks to earn his living as a [PGA Tour] player," and his "workplace" discrimination claim cannot be within the scope of Title III. *See* Pet. Br. at 16-18, 29-30. Conversely, petitioner argues that granting respondent Title III relief would open the door to numerous job-related claims by workers, like respondent, deliberately left uncovered by Title I. *Id.* at 24.

These arguments are merely linguistic sleights-of-hand. To the extent that terms like "worker," "work," "working," and "workplace" are used in discussing ADA provisions, they must be understood as synonymous with "employee," "employment," and "place of employment." With such an understanding, petitioner's purported conflict between Title I's limitation to employers having fifteen or more employees and the broad coverage of Title III disappears. *Id.* at 17-18, 24-25, 28-29.

All "employment" matters are within the scope of Title I; when Congress exempted those employers having fewer than fifteen employees from Title I, it precluded employees of those small employers from any coverage for claims arising out of their employment situation. They cannot pursue these claims under Title III because, as petitioner accurately points out, "Title III is not intended to govern any terms of employment provided by providers of public accommodations .... " *Id.* at 15, (quoting H. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (emphasis added)). The report adds to the quoted language that "employment practices are governed by Title I of this legislation." *Id.* (emphasis added). Any type of "goods, services, facilities, privileges, advantages, or accommodations" that does not constitute "employment," including the performances or activities of athletes, contestants, and other performers who may vie for monetary or

other rewards at places of public accommodation, is governed by Title III.

That respondent may seek to earn a living as a player in PGA Tour events is completely irrelevant to whether he is doing so as an employee of the PGA. A professional gambler may earn his living playing games of chance at a casino, but that fact does not make the gambler an employee of the casino, nor any less a "customer or client"; the gambler is clearly protected under the language of Title III regardless of whether the games played are merely a light diversion or an attempt to make a living. Similarly, Title III protects a professional golfer.

2. When Congress Sought to Create Exceptions to, or Limitations on, Title III Coverage, It Did So Expressly.

When Congress wanted to create exceptions to the expansive coverage it imposed under Title III, it did so clearly and explicitly. For example, Congress expressly incorporated into the ADA the so-called "Mrs. Murphy's Boarding House exception" to lodging establishments, set out in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1). *See* 42 U.S.C. § 12181(7)(A).[11] Likewise, based upon concerns voiced by the Attorney General,[12] Congress added an exemption from Title III for "religious organizations or entities controlled by religious organizations." 42 U.S.C. § 12187. Section 12187 contains another exemption added by Congress

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[11] Excepted is "an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor."

[12] *See Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. at 200 (1989) (testimony of Attorney General Thornburgh) ("any new legislative initiative should avoid potential confrontation with the First Amendment to the Constitution that might arise with the coverage of religious institutions").

to the coverage of Title III by explicitly incorporating by reference the exemption for "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964." 42 U.S.C. § 2000-a(e).

The ADA does not create exceptions by implication; it does so clearly and expressly.[13] Congress did not intend that additional exceptions, not provided in the text of the Act, should be read into the ADA.

II. PETITIONER CANNOT DEMONSTRATE THAT THE MODIFICATION REQUESTED BY RESPONDENT WOULD "FUNDAMENTALLY ALTER THE NATURE" OF PGA TOUR EVENTS.

The ADA's central objective of allowing persons with disabilities to participate and compete on an equitable basis relative to other people[14] necessitates reasonable adjustments to the way activities and programs are structured.

[13] Among many other examples of express exclusions and exemptions established in the ADA, *see* 42 U.S.C. § 12208 (excluding transvestites from the terms "disabled" or "disability"); *id.* § 12210(a) (excluding individuals currently engaged in the illegal use of drugs from the term "individual with a disability"); *id.* § 12211(a) (declaring that homosexuality and bisexuality are not disabilities under the ADA); *id.* § 12211(b) (excluding 11 different mental conditions from the term "disability").

[14] *See, e.g.*, Senator Dole's insertion into the record of the "poignant remarks" of James Brady, President Reagan's former press secretary, 135 CONG. REC. S 10791 (daily ed. Sept. 7, 1989) ("Passage of the ADA will increase the acceptance, dignity, and full participation of citizens with disabilities. We do not want pity or sympathy. All we want is the same civil rights and opportunities that all citizens have. We want fairness, acceptance, and the chance to contribute fully to our nation -- just like everyone else"); 135 CONG. REC. S 10711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. It is time we eliminate these injustices.")

Accordingly, Congress established a reasonable modification requirement as a component of provisions prohibiting discrimination on the basis of disability in public accommodations. 42 U.S.C. §12182(b)(2)(A)(ii). Pursuant to this provision, Title III of the ADA requires the petitioner to allow respondent to use a golf cart as a reasonable modification during PGA Tour events unless the petitioner can demonstrate it would fundamentally alter those events. The district court correctly concluded that it had a duty to make an independent inquiry into the purpose of the petitioner's no-ride/walking rule and found that the modification to the rule sought by respondent would not frustrate the purpose of the rule nor fundamentally alter the nature of PGA Tour events (J.A. 66-73). [15]

[15] The opinion of the court of appeals (J.A. 34-48) is reported at 204 F.3d 994 (1998). The opinions of the district court (J.A. 49-73, 74-88) are reported at 994 F. Supp. 1242 (1998) and 984 F. Supp. 1320 (1998). The district court's focus on the "purpose" rather than simply the content of a rule or requirement has long been an element of disability nondiscrimination analysis. For example, shortly after the decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Secretary of Health, Education and Welfare, sent a letter to college presidents to clarify the impact of the *Davis* ruling. The letter declared:

> It is, of course, the institution's prerogative to define the role and purpose of its educational program and to determine academic requirements, *i.e.*, to make what the Supreme Court calls "legitimate academic policy." However, if a college excludes a [person with a disability] from its program on the basis of his or her inability to complete course requirements, Section 504 [of the Rehabilitation Act] requires that the college be able to demonstrate that the requirements are essential to the scope and purpose of the program.

Letter of Patricia Roberts Harris to College Presidents (Oct. 5, 1979). Similarly, in the employment context, the Equal Employment Opportunity Commission has declared:

> In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed.... Although it may be essential that the function be performed,

A. Petitioner's Analytic Framework.

Petitioner, relying in part on the ruling of the Seventh Circuit in *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), proposes a framework for analyzing requests for "reasonable modifications" to requirements imposed by its rules or the rules of any professional sports organization. Petitioner assumes that there must always be absolute uniformity in the application of all rules to "highest-level" events.[16] Pet. Br. at 32-35. It declares that "perhaps the most fundamental attribute of professional sports in general, and of elite golf tournaments in particular" is "that all competitors are required to play by the same substantive rules." *Id.* at 32-33. Petitioner contends that "[t]his need for uniformity does not vary with the 'individual circumstances' of a particular competitor, and an examination of those circumstances... is neither necessary nor justified." *Id.* at 35, n. 24.

The only impact of the ADA on this process, according to petitioner, is that a court may "question whether a particular rule may, in fact, have a possible (non-trivial) effect on the outcome of the athletic competition." *Id.* at 34-35. Thus, the only instance in which the ADA would result in an exception or modification to a rule would be where the rule has no impact or only a "trivial" one, in which case "it could be waived for any competitor." *Id.* at 35.

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frequently it is not essential that it be performed in a particular way.

Equal Employment Opportunity Commission, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT at II-16 (§ 2.3(a)) (1992) (emphasis in original).

[16] The issue of whether a uniform waiver of the no-ride/walking rule would, in fact, have any non-trivial impact on the outcome of PGA top-level tournaments is, of course, a continuing matter of dispute decided in respondent's favor in the lower courts.

Petitioner asks this court to disregard the statutory language, framework, and legislative history of the ADA in favor of an argument that says, in effect, "we'll continue to do things the way we've always done them." Congress enacted the ADA to eliminate discrimination arising from just such an attitude.

B. The ADA Statutory Framework for Determining What Is a Fundamental Alteration.

The ADA requires public accommodations to make "reasonable modifications to policies, practices, or procedures," to permit an individual with a disability an opportunity to obtain the goods, services, facilities, privileges, or accommodations being offered; a business is not required, however, to make modifications that it "can demonstrate . . . would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii).

1. The Role of the Reasonable Modification Requirement.

In drafting the ADA, Congress derived the "reasonable modification" concept, 42 U.S.C. § 12182(b)(2)(A)(ii), and its close analog, "reasonable accommodation," 42 U.S.C. § 12111(9), from prior disability nondiscrimination statutes,[17] regulations,[18] and case law.[19]

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[17] *See* 42 U.S.C. § 3604(f)(3)(B) (the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619) (requirement "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons [*i.e.*, persons with disabilities] equal opportunity to use and enjoy a dwelling"); 29 U.S.C. §794a(a)(1) (Section 505 of the Rehabilitation Act, added in 1973) (authorized courts to "take into account the reasonableness of the cost of any necessary workplace accommodation").

In the U.S. Commission on Civil Rights' report, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983),[20] the Commission traced the purpose and history of the reasonable accommodation concept. The Commission identified its basic purpose as follows:

> Discrimination against [people with disabilities] cannot be eliminated if programs, activities, and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit [people with disabilities] to participate fully have been broadly termed "reasonable accommodation." *Id. at* 102.

[18] *See, e.g.*, 41 C.F.R. § 60-741.6(d) (1990) (Department of Labor regulation to implement Section 503 of Rehabilitation Act of 1973); 45 C.F.R. § 84.12 (1990) (HHS regulation to implement Section 504 of the Rehabilitation Act).

[19] *See, e.g., School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987); *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

[20] *See* S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990). The Court has also cited ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES as authority regarding the nature of discrimination on the basis of disability. *Alexander v. Choate*, 469 U.S. 287, 295-96, nn. 12 and 16 (1985).

The report offered the following definition of reasonable accommodation: "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence." *Id.*

Prior to the enactment of the ADA, the Court had recognized the importance of a reasonable accommodation requirement in eliminating discrimination against individuals with disabilities in both the employment[21] and the non-employment context.[22]

In drafting the ADA, Congress established a "reasonable modification" requirement in Title III (42 U.S.C. § 12182(b)(2)(A)(ii)), and a "reasonable accommodation" requirement in the employment context (Title I). See *id.* §§ 12111(9), 12112(b)(5)(A). In *Alexander v. Choate*, the Court used the terms "reasonable accommodations,"

[21] *School Board of Nassau County v. Arline, 480 U.S. 273 (1987). In Arline*, the Court declared unequivocally that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee." 480 U.S. at 289 n. 19. The Court termed it "well established" that in employment discrimination cases under Section 504, among "[t]he basic factors to be considered" is "whether any reasonable accommodation by the employer would enable the handicapped person to perform [the essential functions of the job in question]." *Id.* at 287 and n. 17. The Court remanded the case and directed the district court to determine, *inter alia*, "whether the School Board could have reasonably accommodated" the plaintiff. *Id.* at 288-289.

[22] *Alexander v. Choate*, 469 U.S. 287 (1985). In *Alexander*, the Court declared that the nondiscrimination mandate of Section 504 of the Rehabilitation Act of 1973 requires that individuals with disabilities be provided "meaningful access" that would be effectively denied unless reasonable accommodations are required. 469 U.S. at 301. The Court recognized a need for "those changes that would be reasonable accommodations," *id.* at 300 n. 20., and noted with approval that "[t]he regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* at 301 n. 21.

"reasonable adjustments," and "reasonable modifications" interchangeably. 480 U.S. at 299–301. In the ADA, the terms "reasonable modification" and "reasonable accommodation" have very similar meanings conceptually.

2. *Public Accommodations Have the Burden of Proof on the Fundamental Alteration Issue.*

The ADA imposes the burden of proof on a public accommodation to show that a requested reasonable accommodation that it seeks to avoid would constitute a "fundamental alteration." 42 U.S.C. § 12182(b)(2)(A)(ii) provides that a public accommodation is not required to make modifications that "the entity can demonstrate ... would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." The imposition of this burden of proof on public accommodations is consistent with the assignment of the burden of proof to covered entities under the Rehabilitation Act of 1973[23] and Title I of the ADA.[24]

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[23] *See, e.g.*, 41 C.F.R. § 60-741, Appendix A at paragraph 1 (2000). (Section 503 regulation) ("unless the contractor can demonstrate that the accommodation would impose an undue hardship on operation of its business"); 45 C.F.R. § 84.12 (a) (1999). (HHS Section 504 of the Rehabilitation Act of 1973 regulation regarding recipients of federal financial assistance) ("unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program"); 29 C.F.R. § 1614.203(c)(1) (2000) (EEOC Section 501 regulation) ("unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program"); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981) ("the burden of proving inability to accommodate is upon the employer").

[24] 42 U.S.C. § 12112(b)(5)(A) ("unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"). *See also* H.R. Rep. No. 101-485, pt. 3, at 42 (1990) ("Like Section 504 of the

3. *Stringency of the Fundamental Alteration Standard.*

The concept of fundamental alteration originated in the Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979), in which it held that, under Section 504 of the Rehabilitation Act, a university was not required to modify its clinical nursing program by converting it into a program of purely academic classes to accommodate a woman with a hearing impairment. "Such a fundamental alteration," the Court said, "is far more than the 'modification' the regulation requires." *Id.*

In applying the "fundamental alteration" concept, other courts have spelled out some of its implications: alterations are not required if they would endanger a program's viability;[25] massive changes are not required;[26] modifications involving a "major restructuring" of an enterprise or that "jeopardize the effectiveness" of a program are not required;[27] modifications are not required if they would so alter an enterprise as to create, in effect, a new program.[28] In 1984, legal commentators proposed the following definition of "fundamental alteration": "(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or essential components required to achieve a

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Rehabilitation Act, the burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship.").

[25] *New Mexico Ass'n of Retarded Citizens v. New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982).

[26] *Dopico v. Goldschmidt*, 687 F.2d 644, 653 (2d Cir. 1982).

[27] *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 549 F.Supp. 592, 607, 611 (D.R.I. 1982).

[28] *Doe v. Colautti*, 592 F.2d 704, 707-09 (3d Cir. 1979); *Turillo v. Tyson*, 535 F.Supp. 577, 587 (D.R.I. 1982); *Lynch v. Maher*, 507 F.Supp. 1268, 1280 (D.Conn. 1981); *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 549 F.Supp. 592, 607 (D.R.I. 1982).

program or activity's primary purpose or benefit."[29] The first type of fundamental alteration would change the program or activity into something else, as in the *Davis* case; the second would cause it to fail.

In ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES, *supra*, the U.S. Commission on Civil Rights discussed the origins of the fundamental alteration concept in *Southeastern Community College v. Davis*, and concluded that "[t]his qualitative restriction makes unnecessary modifications that run the risk of affecting the program's essence." ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES at 113. The report elaborates as follows:

> The implication of the Court's analysis is that some program functions and program requirements are essential, while others may be only incidental. The incidental-essential distinction is also consistent with the premise that there are frequently equally effective ways in which tasks and activities may be restructured to achieve similar objectives.

Id. at 124. The Congress acted upon this understanding of the concept of "fundamental alteration" by incorporating it as an outer limit on the duty of public accommodations to make reasonable modifications. In implementing the statute and assisting covered entities to comply with the ADA, the U.S. Department of Justice has defined fundamental alteration as a "modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered." U.S. Department

[29] Robert Burgdorf Jr. and Christopher Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITIES LAW REPORTER 64, 70 (Jan./Feb. 1984).

of Justice, THE AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL at 27 (1990).

The Congressional committee reports give very few examples of the application of the fundamental alteration limitation. Each of the examples involves a relatively extreme situation that clearly would change the nature or seriously damage the enterprise involved.[30]

As the legislative record and history show, Congress intended the standard of altering the essential nature of an activity or service to be a stringent one.

4. Individualized Determinations.

Because "[i]ndividualizing opportunities" is the "essence" of the reasonable modification/reasonable accommodation requirement, U.S. Commission on Civil Rights, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983), it is hardly surprising that determinations regarding the need for particular modifications, and whether a particular proposed modification constitutes a fundamental alteration, must be made on a case-by-case basis involving an examination of the specific factual situation involved. In its ADA report, the House Judiciary Committee observed that "[a] reasonable accommodation should be tailored to the needs of the

[30] Two of the reports indicate that physicians who specialize in treating "burn victims" do not have to modify their practices to treat a deaf individual who does not have burns. S. Rep. No. 101-116, at 62 (1989); H.R. Rep. No. 101-485, pt. 2, at 105-106 (1990). And the House Committee on the Judiciary report states that "[i]t would not be a violation of this title to refuse to modify a policy of not touching delicate works of art for a person who is blind if the touching threatened the integrity of the work." H.R. Rep. No. 101-485, pt. 3, at 59 (1990). Changing the business of a public accommodation to another business and damaging delicate works of art are the types of harm to the essential nature of an activity that the fundamental alteration limitation contemplates.

individual and the requirements of the job." H.R. Rep. No. 101-485, pt. 3, at 39 (1990). The Senate Labor Committee and House Education and Labor Committee reports both concurred that reasonable accommodations involve a "fact-specific, case-by-case approach." S. Rep. No. 101-116, at 31 (1989); H.R. Rep. No. 101-485, pt. 2, at 62 (1990). One component of this individualized determination involves resolving whether or not the public accommodation has, pursuant to the statutory language, "demonstrated" that a particular modification would entail a fundamental alteration of the particular good, service, facility, privilege, advantage, or accommodation at issue.

C. Application of the ADA's Fundamental Alteration Limitation in the Present Case.

The analytic framework for fundamental alteration established by the ADA applies fully to the claim of the petitioner in this case. Under the statute, petitioner is required to make the reasonable modification sought by respondent unless petitioner "can demonstrate" that it would entail a fundamental alteration to the "nature of the goods, services, facilities, privileges, advantages or accommodations" petitioner provides at its events. 42 U.S.C. § 12182(b)(2)(A)(ii). The "reasonable modification" requirement plays a crucial role in ensuring meaningful opportunities for people with disabilities and is central to the non-discrimination mandate of the ADA. Accordingly, fundamental alteration claims must be assessed against a stringent standard requiring that a modification be so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered. The burden of demonstrating that a fundamental alteration will occur is on respondent and such a showing must be done on a case-by-case basis.

The application of these principles inevitably leads to the conclusion reached by the district court and the Ninth Circuit in this case -- that petitioner has not shown that use of a golf cart by respondent would fundamentally alter petitioner's tour events. Since November of 1997, respondent has used a golf cart in tour events, without destroying the integrity or threatening the essential nature of the PGA Tour. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1322 (D. Or. 1998). Petitioner nonetheless seeks to establish a fundamental alteration claim by arguing that any change to its substantive rules (or those of any high level professional sports competition), by definition constitutes a fundamental alteration, independent of the individual circumstances of any particular competitor or any particular requested accommodation. *See* Pet. Br. at 32-36. In addition, petitioner argues that "[i]t would impose a substantial burden on the Tour" to engage in individualized determinations of the impact of a modification. *Id.* at 40. Both of these contentions are misguided. The most fundamental flaw in petitioner's arguments that (1) uniformity of its rules should be inviolable, and (2) it should escape individualized modifications because they would pose a substantial burden, is that neither of them has any basis in either the statutory language or the legislative history of the ADA. Petitioner would carve out areas of immunity from statutory regulation and create new standards excusing noncompliance that Congress did not see fit to establish. As the Ninth Circuit observed, petitioner's position "would read the word 'fundamentally' out of the statutory language ...." J.A. 44.[31]

Every category of covered entity under the ADA, including employers, state and local government entities, public transportation providers, and various types of public accommodations would certainly defend the need for

[31] The opnion of the Court of Appeals is reported at *Martin v. PGA*, 204 F 3d 994 (1998).

uniformity of their rules and operational practices, and resist any individualized determinations that would pose additional burdens on them. Yet sound public policy requires, and the ADA demands, that such uniformity in the form of one-size-fits-all rules, practices, and procedures must give way, and some administrative and logistical responsibilities must be performed, in order to give people with disabilities an opportunity to participate.

Congress could have created a "need-for-uniformity" exception to the requirements of Title III, much as it provided an exception for situations involving a "direct threat" to health or safety. 42 U.S.C. § 12182(b)(3). Congress chose to create no such exception in defining the fundamental alteration concept and there is absolutely no hint of any congressional intent that petitioner's wished-for exceptions should be read into the statute.

Moreover, the factual premises upon which petitioner bases its asserted exceptions are not sound. The Ninth Circuit found that "[n]othing in the record establishes that an individualized determination would impose an intolerable burden on the PGA." J.A. 47. This finding is particularly determinative in light of petitioner having the burden to demonstrate fundamental alteration. And petitioner's insistence on the necessity of absolute uniformity in the application of its rules and the impracticality of administering individualized waivers is wholly undercut by the *Modification of the Rules of Golf for Golfers with Disabilities*, adopted by the United States Golf Association (USGA) and the Ancient Golf Club of St. Andrews, Scotland -- the official promulgators of the Rules of Golf. J.A. 70-72.

The Modification, posted at the USGA website (http://www.usga.org/rules/rule_2000/disabled.html), allows a variety of exceptions to the Rules for golfers with various disabilities. Pursuant to the Modification, the USGA authorizes deviations from the usual rules of golf to permit golfers with disabilities to play on an equitable basis without

an undue advantage over other players through a process that includes subjective determinations and case-by-case decisionmaking. Allowing modifications to the application of rules to permit players such as respondent to compete on an equitable basis would no more "fundamentally alter" PGA Tour events than it has changed the essence of golf under USGA rules. Under the clear statutory language of the ADA, petitioner must be required to make the kinds of reasonable modifications respondent is seeking in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

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